

88-108

CORRECTED

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

No.

Office - Supreme Court, U.S.
FILED

JUL 8 1983

ALEXANDER L. STEVAS,
CLERK

MARY F. SHOPE, Executrix
of the Estate of GEORGE W.
SHOPE, deceased,

Petitioner,

V.

MARGARET M. HECKLER,
Secretary of Health and
Human Services,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

JOHN DENISON RAY
Member of the Supreme Court Bar
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(704) 586-8931

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LAWRENCE NESTLER
Western North Carolina Legal Services, Inc.
P.O. Box 426
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QUESTION PRESENTED

Whether the federal courts have jurisdiction to entertain constitutional questions arising in Social Security matters.

PARTIES TO THE PROCEEDING

The Petitioner is Mary F. Shope, Executrix of the Estate of George W. Shope, deceased. Mrs. Shope was substituted as party administratively, following her husband's death, and subsequent to the denial by the Social Security Administration of her husband's request for hearing on his Social Security Disability claim.

The Respondent is the Secretary of Health and Human Services of the United States, Margaret M. Heckler.

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No.

MARY F. SHOPE, Executrix
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MARGARET M. HECKLER,
Secretary of Health and
Human Services,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

Mary F. Shope, Executrix of the Estate of George W. Shope, deceased, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals (App. A, infra) is unreported. The opinion of the District Court (App. D, infra) is unreported.

JURISDICTION

The judgment of the Court of Appeals (App. B, infra) was entered on March 24, 1983. A petition for re-hearing was denied on April 15, 1983 (App. C, infra). The jurisdiction of this court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISION INVOLVED

Section 205(g) of the Social Security Act, 42 U.S.C. 405(g), provides in pertinent part:

Judicial review. Any individual, after any final decision of the Secretary made after a hearing to which he was a party, irrespective of the amount in controversy, may obtain a review of such decision by a civil action commenced within sixty days after the mailing to him of notice of such decision or within such further time as the Secretary may allow. Such action shall be brought in the District Court of the United States for the judicial district in which the Plaintiff resides, or has his principal place of business, or, if he does not reside or have his principal place of business within any such judicial district, in the United States District Court for the District of Columbia. As part of his answer the Secretary shall file a certified copy of the transcript of the record including the evidence upon which the findings and decision complained of are based.

STATEMENT OF THE CASE

George W. Shope, deceased, filed an application for a period of disability and disability insurance benefits on August 3, 1977. The application was denied initially on August 30, 1977, on the grounds that George W. Shope had not met the earnings requirements at the time of the claimed onset of disability or at any later date.

Claimant George Shope filed amended tax returns with the IRS, declaring self-employment income which, if credited, would have given Shope the required quarters for coverage. Thereafter, George Shope requested reconsideration of the earlier denial, but reconsideration was denied on October 6, 1978 for the reason that, ". . . Mr. Shope was unable to furnish evidence to substantiate the validity of the net amount of self-employment income reported." The Reconsideration Determination informed him:

"If you believe the Reconsideration Determination is not correct, you may request a hearing before an administrative law judge of the Bureau of Hearings and Appeals. If you want a hearing you must request it not later than 60 days from the date you receive this notice. You should make this request through any social security office. Please read the enclosed leaflet for a full explanation of your right to appeal." (App. G; Adm. R. 23)
(Emphasis Added)

Claimant George Shope then, pursuant to instruction, went to his local Social Security office in Franklin, N.C., within sixty days of the date of receipt of the reconsideration determination and asked for his hearing, not only once, but several times. (Statement of Len Barone, Social Security office worker, App. E; Adm. R. 13-14; Affidavit of James H. Holloway, App. F, R. 6) However no formal written request for hearing form was prepared and filed until December 15, 1980. The form was prepared by local office worker Len Barone, and accompanied by a statement also prepared by Ms. Barone entitled "Good Cause - Late Filing." The statement explained that the failure to

reduce Shope's request to writing had been the fault of the office and not of the Claimant. (App. E, Adm. R. 13-14)

An Administrative Law Judge dismissed the request for hearing on May 8, 1981 for the reason that the hearing request was not filed within the sixty days of the date of the receipt of the reconsideration determination notice as required by the Social Security regulations. The Law Judge also found that good cause for extension of time for filing had not been shown. His order stated:

Section 404.933 of Social Security Administration Regulations No. 4 requires that a request for hearing be filed within 60 days of the date of receipt of the reconsidered determination notice. However, a request for hearing was not filed in this case until December 15, 1980. Although statements by the claimant and by a district office employee accompanied the request for hearing, alleging that the claimant was under the impression that he had filed a request for hearing, nothing in the file indicates that even an informal request had been made. (Adm. R. 7-8)

George Shope passed away on May 31, 1981 and Mary Shope, his wife, was substituted as Claimant on June 15, 1981. The Appeals Council affirmed the denial of the hearing request on August 13, 1981.

On October 9, 1981, Mary F. Shope filed a civil action in the District Court for the Western District of North Carolina alleging, inter alia, that the Secretary of Health and Human Services had denied due process to her husband on his claim in that he had not been provided with a hearing on his claim, and that such action on behalf of the Secretary was unconstitutional. The Secretary moved that the claim be dismissed on the grounds of lack of jurisdiction.

The District Court agreed with the Secretary and dismissed the action, finding that the Court was without jurisdiction (1) because the Plaintiff failed to exhaust the administrative remedies, (2) because there had been no "final decision" of the Secretary as required by 42

U.S.C. §405(g), and (3) to review allege abuses of agency discretion in refusing to extend time for filing.

Plaintiff Mary F. Shope appealed the District Court's finding of no jurisdiction to the United States Court of Appeals for the Fourth Circuit. The Fourth Circuit panel in a per curiam opinion affirmed the District Court and concluded that "the District Court was correct in holding that the Secretary's decision did not constitute a "final decision" under 42 U.S.C. 405(g) and that the Court therefore lacks jurisdiction."

Mary Shope's Petition for Rehearing with Suggestion for Rehearing en banc was denied on April 15, 1983.

REASONS FOR GRANTING THE PETITION

Because this case involves blatantly unfair treatment of a United States citizen by the Social Security Administration and because prior decisions of this Court clearly instruct that jurisdiction does lie in this case, this Court should grant the Petition and summarily reverse the judgment of the Court of Appeals and direct that the District Court review Petitioner's constitutional claim.

George Shope's Reconsideration Determination informed him:

"If you believe the Reconsideration Determination is not correct, you may request a hearing before an administrative law judge of the Bureau of Hearings and Appeals. If you want a hearing you must request it not later than 60 days from the date you receive this notice. You should make this request through any social security office. Please read the enclosed leaflet for a full explanation of your right to appeal." (App. G; Adm. R. 23)

Shope then went to his local Social Security office and requested a hearing, as the notice informed him. It is uncontroverted and undenied that Shope asked for his hearing within 60 days. He was never granted a hearing, because the form (HA-501) was not prepared within the 60 days, which by admission of the local office worker, was the fault of the office and not of the Claimant.

Shope has asserted that he has been denied a most basic and fundamental constitutional right, the right to be heard. That this Court has jealously guarded this right and has required that it not be infringed is beyond question.

Whether Shope was guaranteed a hearing by statute and regulation as here, or whether there existed no such statutory right, the fifth amendment requires that Claimant be allowed a hearing on his claim for Social Security benefits. Memphis Light, Gas and Water Div. v. Craft, 436 U.S. 1 (1978); Richardson v.

Belcher, 404 U.S. 78 (1971); Goldberg v. Kelly,
397 U.S. 254 (1970)

This Court has consistently held that,
although review of Social Security matters is
~~not~~ generally limited ~~by~~ 42 U.S.C. 405(g),
the Federal Courts clearly have jurisdiction
to review Constitutional claims arising out of
Social Security matters. Califano v. Sanders,
430 U.S. 99 (1977); Mathews v. Eldridge, 424
U.S. 319 (1976); Weinberger v. Salfi, 422 U.S.
749 (1975)

In total disregard of precedent of this
Court, both the District Court and the Court
of Appeals for the Fourth Circuit have failed
to entertain Shope's constitutional claim and
have decided this very important and basic
federal question in a way which conflicts with
applicable decisions of this Court.

Under the rulings below, the Social Secu-
rity Administration will be allowed to routine-
ly deny hearings for any or no reason, and,

because there would then be no "final decision" subject to review under the Act, always escape judicial review.

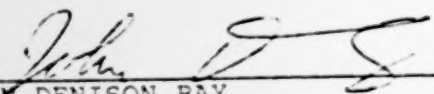
Such a result is contrary to all principles of justice and fair play.

CONCLUSION

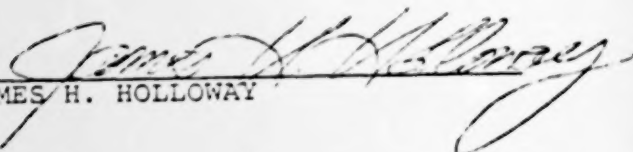
For the foregoing reasons, the Petition should be granted, and the Court should summarily reverse the Court of Appeals and direct that the constitutional claim be entertained below.

July, 1983

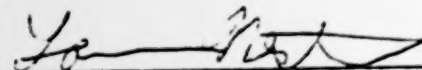
RESPECTFULLY SUBMITTED.



JOHN DENISON RAY



JAMES H. HOLLOWAY



LAWRENCE NESTLER

CERTIFICATE OF SERVICE

This is to certify that I, John Denison Ray, counsel of record for Petitioner in this matter, have this date served a copy of the attached Petition for A Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit by depositing three copies thereof (to each counsel) in the United States mails, first class postage prepaid and properly addressed as shown:

Max O. Cogburn, Jr.
Assistant U.S. Attorney
For the Western District of North Carolina
P.O. Box 132
Asheville, N.C. 28802

Honorable Rex E. Lee
Solicitor General
Department of Justice
Washington, D.C. 20530

This the 7th day of July, 1983.



JOHN DENISON RAY
Counsel of Record for Petitioner

APPENDIX

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 82-1678

MARY F. SHOPE, Executrix of the
Estate of George W. Shope, deceased,
Social Security #261-05-5572

Appellant,

v.

RICHARD SCHWEINER, Secretary of
Health and Human Services of
the United States,

Appellee

Appeal from the United States District Court for the Western
District of North Carolina, at Bryson City. Woodrow W. Jones,
Chief District Judge.

Argued: February 10, 1983

Decided: March 24, 1983

Before SPROUSE and ERVIN, Circuit Judges, and BUTNER, Senior
Circuit Judge.

James H. Holloway, Western North Carolina Legal Services (on
brief) for Appellant; Max O. Cogburn, Jr., Assistant United
States Attorney (Charles R. Brewer, United States Attorney
on brief) for Appellee.

PER CURIAM:

George W. Shope, now deceased, filed a claim for Social Security disability insurance benefits, 42 U.S.C. § 423, on August 9, 1977. The Secretary denied Shope's claim initially and on reconsideration, on the grounds that Shope did not meet the necessary earnings requirement. Shope made informal inquiries at the local Social Security office concerning administrative procedures whereby he could obtain a hearing on the Secretary's denial, but he did not properly request a hearing on his claim until December 15, 1980, more than two years after the time prescribed by regulation. 20 C.F.R. § 404.933. An administrative law judge then dismissed the request for a hearing on the grounds that Shope had not filed a timely request and because he had not established "good cause" to extend the time for filing.

Shope died on May 31, 1981, and his widow, Mary Shope, was substituted as claimant. After an unsuccessful appeal to the Appeals Council, Mrs. Shope sought review in the district court of the Secretary's dismissal of her hearing request. The district court granted the Secretary's motion to dismiss the action for lack of jurisdiction. We have considered the record, the briefs and argument of counsel, and conclude that the district court was correct in holding that the Secretary's decision did not constitute a "final decision" under 42 U.S.C. § 405(g) and that the court therefore lacked jurisdiction. Accordingly, the judgment of the district court is affirmed. *

AFFIRMED.

United States Court of Appeals FOR THE FOURTH CIRCUIT

March 24, 1983

TO: James H. Holloway, Esq.
Patrick Lordeon, Esq.

Max Cogburn, AUSA

NOTICE OF JUDGMENT

Judgment was entered in Case No. 82-1678 this date.

The Court's opinion is enclosed.

Petition for Rehearing (FRAP 40)

**Filing
Time**

A petition may be filed within 14 days after judgment. *No extension will be granted save for the most compelling reasons.* Requests based on grounds such as miscalculation of time or a need to consult with others will be peremptorily denied.

Purpose

A petition should only be made to direct the Court's attention to one or more of the following situations:

1. A material fact or law overlooked in the decision.
 2. A change in the law which occurred after the case was submitted and which was overlooked by the panel.
 3. An apparent conflict with another decision of the Court which is not addressed in the opinion.
- The filing of a petition in order merely to reargue the case is an abuse of the privilege.

**Statement
of Counsel**

A petition shall contain an introduction stating that, in counsel's judgment, one or more of the situations exist as described in the above "Purpose Section". The points to be raised shall be succinctly listed in the statement. Lacking such a statement, the petition will be returned to counsel without filing.

Form

The 15 page limit allowed by the Rule shall be observed. The Court requires 15 copies of the petition; however, a pro se party who is indigent may file the original only.

Bill of Costs (FRAP 39)

**Filing
Time**

A party to whom costs are allowed, who desires taxation of costs, shall file a bill of costs within 14 days after judgment.

Mandate (FRAP 41)

**Issuance
Time**

The mandate is issued 21 days after judgment. A timely petition for rehearing will stay the issuance. If the petition is denied, the mandate will issue 7 days later. If a stay of mandate is sought, only the original of a motion need be filed.

Stay

A motion for stay of the issuance of the mandate shall not be granted simply upon request. Ordinarily the motion will be denied unless it would not be frivolous or filed merely for delay and would present a substantial question or otherwise set forth good or probable cause for a stay.

WILLIAM K. SLATE, II
CLERK

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 82-1678

Mary F. Shope, etc.

RECEIVED

APR 19 1983

Appellant,

versus

Richard Schweiker, etc.,

WESTERN U. S. LEGAL SERVICES

Appellee.

O R D E R

Upon consideration of the appellant's petition for rehearing and suggestion for rehearing en banc, and no judge having requested a poll on the suggestion for rehearing en banc,

It is ADJUDGED and ORDERED that the petition for rehearing is denied.

Entered at the direction of Judge Sprouse for a panel consisting of Judge Sprouse, Judge Ervin, and Judge Butzner.

For the Court,

/s/ William K. Clato, II

CLERK

FILED

APR 15 1983

U. S. Court of Appeals
Fourth Circuit

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE WESTERN DISTRICT OF NORTH CAROLINA

BRYSON CITY DIVISION

B-C-81-242

MARY F. SHOPE, Executrix of
the Estate of GEORGE W. SHOPE,
deceased,

Plaintiff,

v.

RICHARD SCHWEIKER, Secretary
of Health and Human Services
of the United States,

Defendant.

MEMORANDUM OF DECISION

FILED

MAR 21 1982

ASHEVILLE, N. C.
U. S. DISTRICT COURT
WESTERN DISTRICT OF N.C.

The Plaintiff brought this action pursuant to Section 205(g) of the Social Security Act, as amended [42 U.S.C.A. §405(g)] to obtain judicial review of the dismissal of her request for a hearing on her claim for disability benefits under Title II of the Social Security Act. The Plaintiff is the duly appointed Executrix of the Estate of George W. Shope, deceased, and the surviving spouse of the deceased. This matter is presently before the Court upon the Defendant's motion to dismiss. Hearings were held on this motion on March 15, 1982 and May 17, 1982 and the parties were given until June 1, 1982 to submit additional briefs. After a careful consideration of the record, briefs and arguments of counsel, the Court now enters its findings and conclusions.

Mr. Shope filed an application for a period of disability and disability insurance benefits on August 8, 1977 (Rec. 79-82). The application was denied initially on August 30, 1977 (Rec. 77-78). The first request for reconsideration filed March 10, 1978, was dismissed for late filing (Rec. 27). However on October 6, 1978 the Secretary denied Shope's application on reconsideration because Shope had not met the earnings requirement at the time of the claimed onset of disability or at any later date (Rec. 23). Mr. Shope submitted additional evidence on his insured status in

August 1979 and the Social Security Administration notified him by letter dated February 26, 1980 that the evidence he had presented did not change the previous determination and that he still did not meet the insured status requirements.

Mr. Shope did not make a written request for a hearing until December 15, 1980, more than two years after the request deadline.¹ Apparently Mr. Shope made several oral requests for a hearing prior to his written request. Len Barone, a case worker for the Secretary, attached a statement to Mr. Shope's written request for a hearing and stated:

. . . Recon was filed-denied-w/e stated that he wanted a hearing. However formal request was never filed and therefore hearing was never held. w/e has submitted evidence periodically during the last 2 yrs. but no notice re. hearing ever given. I feel that it is the fault of this office that hearing was never held. We simply kept fwdg. info to program center and failed to get formal request for hearing. I sincerely believe good cause for late filing should be found in this case.

An administrative law judge (hereinafter ALJ) dismissed the request for hearing on May 8, 1981 because the hearing request was not filed within 60 days of the date of receipt of the reconsideration determination notice as required by the regulations. The ALJ also found that good cause for extension of time for filing had not been shown (Rec. 7-8). Mr. Shope died on May 31, 1981, and Mary Shope was substituted as party Plaintiff on June 15, 1981. The Appeals Council affirmed the denial of the hearing request on August 13, 1981.

The Defendant contends in its motion to dismiss that this Court lacks jurisdiction (1) because the Plaintiff failed to exhaust the administrative remedies, (2) because there has been no "final decision" of the Secretary as required by 42 U.S.C.A. §405(g), and (3) to review alleged abuses of agency discretion in refusing to extend time for filing. The Plaintiff argues that

¹ Title 20, CFR §404.933 requires that a request for a hearing must be in writing and must be made within sixty days after the date the claimant received notice of the previous determination. Title 20, CFR §404.933(c) allows the claimant to request for an extension of time to file a hearing request if he missed the original filing deadline. If the claimant can show "good cause" for missing the deadline, the time period will be extended. 20 CFR §404.933(c) and 404.911.

Mr. Shope did everything he was required to do under the law and made a timely request for a hearing. She contends that after Mr. Shope orally requested a hearing, the local Social Security office failed to perform a ministerial act, completing a Request for Hearing Form and having Mr. Shope sign it. The Plaintiff asserts that after the oral request for a hearing, it was the duty of the local Social Security office to explain the hearing procedure to Mr. Shope and to prepare for him a written request for a hearing. Plaintiff Shope insists that this case does not involve a failure to make a timely request for hearing or a judicial review of an abuse of agency discretion but rather concerns the failure of the Defendant to perform duties required of him initially by due process.

The Court reluctantly finds that it lacks jurisdiction to review the denial of the extension of time to file a hearing request. Title 42, U.S.C.A. §405(g) extends subject matter jurisdiction for judicial review of Social Security claims only to "final decisions of the Secretary made after a hearing . . ." The Supreme Court has had at least three occasions to deal with the issue of judicial jurisdiction in Social Security cases.

In Weinberger v. Salfi, 422 U.S. 749, 95 S.Ct. 2457, 45 L.Ed.2d 522 (1975), the Supreme Court expressly held that §405(g) prevents review of the Secretary's decisions except as provided in §405(g) of the Act. Id. at 757, 95 S.Ct. at 2457. The Court stated that under §405(g) a "final decision" of the Secretary is a "jurisdictional prerequisite" for judicial review and that exhaustion of administrative procedures "may not be dispensed with merely by a judicial conclusion" that a failure to exhaust the administrative procedures was not intentional. 422 U.S. 766, 95 S.Ct. at 2467. Under the statutory scheme contained in §§405(g) and (h), the presence of a final decision is essential to determine when and if judicial intervention is proper. The Court recognized that the Secretary has the authority to "flesh out by regulation" the meaning of the term "final decision." Id., 95 S.Ct. at 2467. "The statutory scheme is thus one in

which the Secretary may specify such requirements for exhaustion as he deems serve his own interests in effective and efficient administration." Id.

In Mathews v. Eldridge, 424 U.S. 319, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976), the Court expounded on the Salfi decision and explained that the final decision requirement consists of two elements: (1) the waivable element that the administrative remedies prescribed by the Secretary be exhausted and (2) the non-waivable "jurisdictional" element that a claim for benefits shall have been presented to the Secretary. Id. at 328, 96 S.Ct. at 899. As in Salfi, the Court in Mathews carved out a narrow exception to the exhaustion requirement: The Secretary may waive the exhaustion requirement if he satisfies himself, at any stage of the administrative process, that no further review is warranted because a matter of constitutional law concededly beyond the Secretary's competence to decide or to grant the relief sought is involved. Mathews v. Eldridge, 424 U.S. at 330, 96 S.Ct. at 900. Weinberger v. Salfi, 422 U.S. at 765-767, 95 S.Ct. at 2467.

In Califano v. Sanders, 430 U.S. 99, 97 S.Ct. 980, 51 L.Ed.2d 192 (1977), the Supreme Court held that §405(g) "cannot be read to authorize judicial review of alleged abuses of agency discretion in refusing to reopen claims for social security benefits." Id. at 107-108, 96 S. Ct. at 985.

In the present case, there is no doubt that Shope presented his claim for disability benefits to the Secretary. However, Shope failed to exhaust his administrative remedies by failing to file timely his request for a hearing. The Secretary has not waived the exhaustion requirement since there is no constitutional question involved. Mr. Shope's failure to file a request for hearing timely ended the administrative action. Under the regulations as promulgated by the Secretary, it was then at the discretion of the Secretary as to whether or not to reopen the matter and to allow Shope to have a hearing. Requests for reopening and for extensions of time are both procedural devices used

after the time for appeal to the next level of administrative review has expired and are addressed to the sole discretion of the Secretary. The ALJ made the discretionary determination that the claimant had failed to establish "good cause" to extend the time for filing. Under the authority of Salfi and Mathews, the Court finds that the denial of the request to extend time for the filing of a hearing request was not a "final decision," that Shope failed to exhaust his administrative remedies and that there is no constitutional claim exception involved. Furthermore, this case is at most an example of an alleged abuse of agency discretion. Under Sanders, this Court is without jurisdiction under §405(g) to review abuse of agency discretion.

Therefore, under the authority of Salfi, Mathews and Sanders, this Court lacks jurisdiction to review the denial of the motion to extend time for filing and must dismiss the action. The Court concludes that the Defendant's motion to dismiss for lack of jurisdiction should be allowed.

A judgment in accordance with the above findings and conclusions shall be entered simultaneously herewith.

This the 19th day of July, 1982.

s/ Woodrow W. Jones

Chief Judge

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE WESTERN DISTRICT OF NORTH CAROLINA

BRYSON CITY DIVISION

B-C-81-242

MARY F. SHOPE, Executrix of
the Estate of GEORGE W. SHOPE,
deceased,

Plaintiff,

v.

RICHARD SCHWEIKER, Secretary
of Health and Human Services
of the United States,

Defendant.

JUL 21 1982

JUL 21 1982
ASHEVILLE, N. C.
U. S. DISTRICT COURT
WESTERN DISTRICT OF N.C.

THIS MATTER was heard before the Court and the issues
having been determined as shown by a Memorandum of Decision
entered by the Court simultaneously herewith;

IT IS ORDERED, ADJUDGED, AND DECREED that the decision
of the Secretary of Health and Human Services denying benefits
under the Social Security Act to the Plaintiff be and the
same is hereby affirmed, and the action is hereby dismissed.

The Clerk is directed to send a copy of the Memo-
randum of Decision and this Judgment to the attorney for the
Plaintiff and to the United States Attorney.

This the 19th day of July, 1982.

s/ Woodrow W. Jones

Chief Judge

REPORT OF CONTACT

(Use ink or typewriter)

ALL INFORMATION CONTAINED HEREIN IS UNCLASSIFIED

857-05-5572

NAME OF AGENT ASSIGNED TO THIS CASE

George W. Shore

TO: HE MAT SE GL WN MAM

BDI DIO DDS

PERSON(S) CONTACTED AND ADDRESS(ES) ☐ WE OR SE PERSON ☐ OTHER (Specify)

CONTACT MADE ☐ DO ☐ BO ☐ HOME ☐ PHONE ☐ OTHER

DATE OF CONTACT

SUBJECT: Good Cause - Late Filing -

The wife filed for discharge in 1977 - At that time, he also filed amended Tax returns for (20/40 involved). No decision was ever made because of the 20/40 issue - He was denied on the basis that 20/40 not met. SSA - removed SE (inserted and returned) - Record was filed - Denied - Wife stated he wanted a hearing - However formal request was never filed and therefore hearing was never held. Wife has submitted evidence periodically during the last 5- yrs. but no notice re. hearing ever given.

DISTRICT OFFICE (Name, Address & County)

☐ CR ☐ PR ☐ SR ☐ CLAIMS
CLERICAL

☐ OTHER (Specify)

DATE OF REPORT

Page 1 of 2

REPORT OF CONTACT

(Use ink or typewriter)

257-05-53-75

NAME OF MAIL CARRIER OR SL PERSON

George W. Shore

NE MAT SE GL WN MAX

TO

BDI DIO DDI

PERSONS CONTACTED AND QUALITIES ☐ NE OR SE PERSON ☐ OTHER (Specify)DATE OF CONTACT ☐ BY ☐ TO ☐ CS ☐ HOME ☐ PHONE ☐ OTHER

DATE OF CONTACT

SUBJECT

I feel that it is the fault of this office, that Currier was never held - We never kept fully into the program until as it might be - I never request for him.

I sincerely believe good cause for that filing - he will be found in this case.

John D. Barone

DATE OF CONTACT

10/19/52

Franklin NC (42)

R ☐ PR ☐ SR ☐ CLAIMS ☐ CLERICAL

OTHER (Specify)

DATE OF CONTACT

10/15/52
10/2/52

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
BRYSON CITY DIVISION

MARY F. SHOPE, Executrix of The
Estate of George W. Shope,
deceased,

Plaintiff,

vs.

RICHARD SCHWEIKER, SECRETARY OF
HEALTH AND HUMAN SERVICES OF THE
UNITED STATES,

Defendant.

CIVIL NO. B-C-81-242

AFFIDAVIT

STATE OF NORTH CAROLINA

COUNTY OF SWAIN

I, JAMES H. HOLLOWAY, being first duly sworn, state the following
upon personal knowledge and oath:

1. I am co-counsel for Plaintiff in the above-entitled action.
2. In the course of my investigation of the matters and things at
issue herein, I had occasion, with prior approval of the office
of the United States Attorney, to engage in a telephone conver-
sation on March 12, 1982 with LEN BARONE, an official of the
Franklin District Office of the Social Security Administration,
wherein she related to me the following:

That she personally knew the decedent GEORGE SHOPE
and that she was familiar with his claim and claim
file for Social Security Disability benefits.

That GEORGE SHOPE came into the Franklin Social
Security Office on several occasions within the
time period required for requesting a hearing,
and that he did in fact ask for his hearing on
those occasions.

THIS the 15th day of March, 1982.

James H. Holloway
JAMES H. HOLLOWAY, AFFIANT

SUBSCRIBED TO AND SWORN TO BEFORE ME this 15th day of March, 1982.

My commission expires:

Appendix F
13a

William H. Morefield
NOTARY PUBLIC

Social Security Notice of Reconsideration

23

From: Department of Health, Education, and Welfare
Social Security Administration

Date: OCT 2 1978

IDI:6761TD-I
251-05-5572 NA

Your Claim Number:

Mr. George W. Shope
Box 7
Otto, North Carolina 28763

251-05-5572

Dear Mr. Shope:

As you requested, your claim has been reconsidered. It has been found that the original decision was correct and in accordance with the law and regulations. The enclosed Reconsideration Determination fully explains the decision reached.

This reconsideration was made by a specially designated staff, different from the staff that made the original decision, and specially trained in the handling of reconsiderations. This staff made an independent and thorough examination of all the evidence on record about your claim.

If you believe that the Reconsideration Determination is not correct, you may request a hearing before an administrative law judge of the Bureau of Hearings and Appeals. If you want a hearing you must request it not later than 60 days from the date you receive this notice. You should make such request through any social security office. Please read the enclosed leaflet for a full explanation of your right to appeal.

Carmell:aca:9/13/78

ISA 10/1/78

Enclosures:
OA-D1227
HEW Publication No. (SSA) 76-10282 BHA-1

Department of Health, Education, and Welfare
Social Security Administration

SSA-LB44 (2-78)

Appendix C

14a

83-108

Office - Supreme Court, U.S.
FILED

IN THE SUPREME COURT OF THE UNITED STATES 1983

OCTOBER TERM, 1982

ALEXANDER L. STEVAS,
CLERK

No.

MARY F. SHOPE, Executrix
of the Estate of GEORGE W.
SHOPE, deceased,

Petitioner,

v.

MARGARET M. HECKLER,
Secretary of Health and
Human Services,

Respondent.

APPENDIX TO
PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

JOHN DENISON RAY
Member of the Supreme Court Bar
c/o Western North Carolina Legal Services, Inc.
P.O. Box 426
Sylva, N.C. 28779
(704) 586-8931

JAMES H. HOLLOWAY
LAWRENCE NESTLER
Western North Carolina Legal Services, Inc.
P.O. Box 426
Sylva, N.C. 28779
(704) 586-8931

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 82-1678

MARY F. SHOPE, Executrix of the
Estate of George W. Shope, deceased,
Social Security #251-05-5572

Appellant,

v.

RICHARD SCHWEIKER, Secretary of
Health and Human Services of
the United States,

Appellee.

Appeal from the United States District
Court for the Western District of North
Carolina, at Bryson City. Woodrow W.
Jones, Chief District Judge.

Argued: February 10, 1983

Decided: March 24, 1983

Before SPROUSE and ERVIN, Circuit Judges,
and BUTZNER, Senior Circuit Judge.

Appendix A

1a

James H. Holloway, Western North Carolina
Legal Services (on brief) for Appellant;
Max O. Cogburn, Jr., Assistant United
States Attorney (Charles R. Brewer, United
States Attorney on brief) for Appellee.

PER CURIAM:

George W. Shope, now deceased, filed a claim for Social Security disability insurance benefits, 42 U.S.C. § 423, on August 8, 1977. The Secretary denied Shope's claim initially and on reconsideration, on the grounds that Shope did not meet the necessary earnings requirement. Shope made informal inquiries at the local Social Security office concerning administrative procedures whereby he could obtain a hearing on the Secretary's denial, but he did not properly request a hearing on his claim until December 15, 1980, more than two years after the time prescribed by regulation. 20 C.F.R. § 404.933. An Administrative law judge then dismissed the request for a hearing on the grounds that Shope had not filed a timely request and because he had not established "good cause" to extend the time for filing.

Shope died on May 31, 1931, and his widow, Mary Shope, was substituted as claimant. After an unsuccessful appeal to the Appeals Council, Mrs. Shope sought review in the district court of the Secretary's dismissal of her hearing request. The district court granted the Secretary's motion to dismiss the action for lack of jurisdiction. We have considered the record, the briefs and argument of counsel, and conclude that the district court was correct in holding that the Secretary's decision did not constitute a "final decision" under 42 U.S.C. § 405(g) and that the court therefore lacked jurisdiction. Accordingly, the judgment of the district court is affirmed.

AFFIRMED.

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

March 24, 1933

TO: James H. Holloway, Esq.
Patrick Lordeon, Esq.

Max Cogburn, AUSA

NOTICE OF JUDGMENT

Judgment was entered in Case No. 32-1678
this date.

The Court's opinion is enclosed.

Petition for Rehearing (FRAP 40)

Filing Time A Petition may be filed with-
in 14 days after judgment.
No extension will be granted
save for the most compelling
reasons. Requests based on
grounds such as miscalcula-
tion of time or a need to
consult with others will be
peremptorily denied.

Purpose A petition should only be
made to direct the Court's
attention to one or more of
the following situations:

1. A material fact or law
overlooked in the deci-
sion.
2. A change in the law
which occurred after the
case was submitted and
which was overlooked by
the panel.

3. An apparent conflict with another decision of the Court which is not addressed in the opinion.

The filing of a petition in order merely to reargue the case is an abuse of the privilege.

Statement
of Counsel

A petition shall contain an introduction stating that, in counsel's judgment, one or more of the situations exist as described in the above "Purpose Section". The points to be raised shall be succinctly listed in the statement. Lacking such a statement, the petition will be returned to counsel without filing.

Form

The 15 page limit allowed by the Rule shall be observed. The Court requires 15 copies of the petition. however, a pro se party who is indigent may file the original only.

Bill of Costs (FRAP 39)

Filing
Time

A party to whom costs are allowed, who desires taxation of costs, shall file a bill of costs within 14 days after judgment.

Mandate (FRAP 41)

Issuance
Time

The mandate is issued 21 days after judgment. A timely petition for rehearing will stay the issuance. If the petition is denied, the mandate will issue 7 days later. If a stay of mandate is sought, only the original of a motion need be filed.

Stay

A motion for stay of the issuance of the mandate shall not be granted simply upon request. Ordinarily the motion will be denied unless it would not be frivolous or filed merely for delay and would present a substantial question or otherwise set forth good or probable cause for a stay.

William K. Slate, II
Clerk

Enclosure

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 82-1673

Mary F. Shope, etc.

Appellant.

versus

Richard Schweiker,

Appellee.

ORDER

Upon consideration of the appellant's petition for rehearing and suggestion for rehearing en banc, and no judge having requested a poll on the suggestion for rehearing en banc,

It is ADJUDGED and ORDERED that the petition for rehearing is denied.

Entered at the decision of Judge Sprouse for a panel consisting of Judge Sprouse, Judge Ervin and Judge Butzner.

For the Court:

FILED
Apr 15, 1983
U.S. Court
of Appeals
Fourth Circuit

/s/ William K. Slate, II
CLERK

Appendix C

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE WESTERN DISTRICT OF NORTH CAROLINA

BRYSON CITY DIVISION

B-C-81-242

Mary F. Shope, Executrix of
the Estate of GEORGE W. SHOPE,
deceased,

Plaintiff,

v.

RICHARD SCHWEINER, Secretary
of Health and Human Services
of the United States,

Defendant.

MEMORANDUM OF DECISION

The Plaintiff brought this action pursuant to 205(g) of the Social Security Act, as amended [42 U.S.C.A. §405(g)] to obtain judicial review of the dismissal of her request for a hearing on her claim for disability benefits under Title II of the Social Security Act. The Plaintiff is the duly appointed Executrix of the Estate of George W. Shope, deceased, and the surviving spouse of the deceased. This matter is presently before the Court

upon the Defendant's motion to dismiss. Hearings were held on this motion on March 15, 1982 and May 17, 1982 and the parties were given until June 1, 1982 to submit additional briefs. After a careful consideration of the record, briefs and arguments of counsel, the Court now enters its findings and conclusions.

Mr. Shope filed an application for a period of disability and disability insurance benefits on August 8, 1977 (Rec. 79-82). The application was denied initially on August 30, 1977 (Rec. 77-78). The first request for reconsideration filed March 10, 1978, was dismissed for late filing (Rec. 27). However on October 6, 1978 the Secretary denied Shope's application on reconsideration because Shope had not met the earnings requirement at the time of the claimed onset of disability or at any later date (Rec. 23). Mr. Shope submitted additional

evidence on his insured status in August 1979 and the Social Security Administration notified him by letter dated February 26, 1980 that the evidence he had presented did not change the previous determination and that he still did not meet the insured status requirements.

Mr. Shope did not make a written request for a hearing until December 15, 1980, more than two years after the request deadline.¹ Apparently Mr. Shope made several oral requests for a hearing prior to his written request. Len Barone, a case worker for the Secretary, attached a statement to Mr. Shope's written request for a

¹ Title 20, CFR §404.933 requires that a request for a hearing must be in writing and must be made within sixty days after the date the claimant received notice of the previous determination. Title 20, CFR §404.933(c) allows the claimant to request for an extension of time to file a hearing request if he missed the original filing deadline. If the claimant can show "good cause" for missing the deadline, the time period will be extended. 20 CFR §404.933(c) and 404.911.

hearing and stated:

. . . Recon was filed-denied-w/e stated that he wanted a hearing. However formal request was never filed and therefore hearing was never held. w/e has submitted evidence periodically during the last 2 yrs. but no notice re. hearing ever given. I feel that it is the fault of this office that hearing was never held. We simply kept fwdg. infor to program center and failed to get formal request for hearing. I sincerely believe good cause for late filing should be found in this case.

An administrative law judge (hereinafter ALJ) dismissed the request for hearing on May 8, 1981 because the hearing request was not filed within 60 days of the date of receipt of the reconsideration determination notice as required by the regulations. The ALJ also found that good cause for extension of time for filing had not been shown (Rec. 7-8). Mr. Shope died on May 31, 1981, and Mary Shope was substituted as party Plaintiff on June 15, 1981. The Appeals Council affirmed the denial of the hearing request on August 13, 1981.

The Defendant contends in its motion to dismiss that this Court lacks jurisdiction (1) because the Plaintiff failed to exhaust the administrative remedies, (2) because there has been no "final decision" of the Secretary as required by 42 U.S.C.A. §405(g), and (3) to review alleged abuses of agency discretion in refusing to extend time for filing. The Plaintiff argues that Mr. Shope did everything he was required to do under the law and made a timely request for a hearing. She contends that after Mr. Shope orally requested a hearing, the local Social Security office failed to perform a ministerial act, completing a Request for Hearing Form and having Mr. Shope sign it. The Plaintiff asserts that after the oral request for a hearing, it was the duty of the local Social Security office to explain the hearing procedure to Mr. Shope and to prepare him a written request for a hearing. Plaintiff Shope in-

sists that this case does not involve a failure to make a timely request for hearing or a judicial review of an abuse of agency discretion but rather concerns the failure of the Defendant to perform duties required of him initially by due process.

The Court reluctantly finds that it lacks jurisdiction to review the denial of the extension of time to file a hearing request. Title 42, U.S.C.A. §405(g) extends subject matter jurisdiction for judicial review of Social Security claims only to "final decisions of the Secretary made after a hearing. . . ." The Supreme Court has had at least three occasions to deal with the issue of judicial jurisdiction in Social Security cases.

In Weinberger v. Salfi, 422 U.S. 749, 95 S.Ct. 2457, 45 L.Ed.2d 522 (1975), the Supreme Court expressly held that §405(g) prevents review of the Secretary's decisions except as provided in §405(g) of the

Act. Id. at 757, 95 S.Ct. at 2457. The Court stated that under §405(g) a "final decision" of the Secretary is a "jurisdictional prerequisite" for judicial review and that exhaustion of administrative procedures "may not be dispensed with merely by a judicial conclusion" that a failure to exhaust the administrative procedure was not intentional. 422 U.S. 766, 95 S.Ct. at 2467. Under the statutory scheme contained in §405(g) and (h), the presence of a final decision is essential to determine when and if judicial intervention is proper. The Court recognized that the Secretary has the authority to "flesh out by regulation" the meaning of the term "final decision." Id., 95 S.Ct. at 2467. "The statutory scheme is thus one in which the Secretary may specify such requirements for exhaustion as he deems serve his own interests in effective and efficient administration. Id.

In Mathews v. Eldridge, 424 U.S. 319, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976), the Court expounded on the Salfi decision and explained that the final decision requirement consists of two elements: (1) the waivable element that the administrative remedies prescribed by the Secretary be exhausted and (2) the non-waivable "jurisdictional" element that a claim for benefits shall have been presented to the Secretary. Id. at 326, 96 S.Ct. at 899. As in Salfi, the Court in Mathews carved out a narrow exception to the exhaustion requirement; The Secretary may waive the exhaustion requirement if he satisfies himself, at any stage of the administrative process, that no further review is warranted because a matter of constitutional law concededly beyond the Secretary's competence to decide or to grant the relief sought is involved. Mathews v. Eldridge,

424 U.S. at 330, 96 S.Ct. at 900. Weinberger v. Salfi, 422 U.S. at 765-767, 95 S. Ct. at 2467.

In Califano v. Sanders, 430 U.S. 99, 97 S.Ct. 980, 51 L.Ed.2d 192 (1977), the Supreme Court held that §405(g) "cannot be read to authorize judicial review of alleged abuses of agency discretion in refusing to reopen claims for social security benefits." Id. at 107-108, 96 S.Ct. at 985.

In the present case, there is no doubt that Shope presented his claim for disability benefits to the Secretary. However, Shope failed to exhaust his administrative remedies by failing to file timely his request for hearing. The Secretary has not waived the exhaustion requirement since there is no constitutional question involved. Mr. Shope's failure to file a request for hearing timely ended the administrative action. Under the regulations as promulgated by the Secretary, it was then at the

discretion of the Secretary as to whether or not to reopen the matter and to allow Shope to have a hearing. Requests for reopening and for extensions of time are both procedural devices and after the time for appeal to the next level of administrative review has expired and are addressed to the sole discretion of the Secretary. The ALJ made the discretionary determination that the claimant had failed to establish "good cause" to extend the time for filing. Under the authority of Salfi and Mathews, The Court finds that the denial of the request to extend time for the filing of a hearing request was not a "final decision," that Shope failed to exhaust his administrative remedies and that there is no constitutional claim exception involved. Furthermore, this case is at most an example of an alleged abuse of agency discretion. Under Sanders, this Court is without jurisdiction under §405(g) to review abuse of

agency discretion.

Therefore, under the authority of Salfi, Mathews and Sanders, this Court lacks jurisdiction to review the denial of the motion to extend time for filing and must dismiss the action. The Court concludes that the Defendant's motion to dismiss for lack of jurisdiction should be allowed.

A judgment in accordance with the above findings and conclusions shall be entered simultaneously herewith.

This the 19th day of July, 1982.

/s/ Woodrow W. Jones

Chief Judge

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE WESTERN DISTRICT OF NORTH CAROLINA

BRYSON CITY DIVISION

B-C-81-242

MARY F. SHOPE, Executrix of
the Estate of GEORGE W. SHOPE,
deceased,

Plaintiff,

v.

RICHARD SCHWEIKER, Secretary
of Health and Human Services
of the United States,

Defendant.

JUDGMENT

THIS MATTER was heard before the Court
and the issues having been determined as
shown by a Memorandum of Decision entered
by the Court simultaneously herewith;

IT IS ORDERED, ADJUDGED, AND DECREED
that the decision of the Secretary of
Health and Human Services denying benefits
under the Social Security Act to the Plain-
tiff be and the same is hereby affirmed,
and the action is hereby dismissed.

The Clerk is directed to send a copy of the Memorandum of Decision and this Judgment to the attorney for the Plaintiff and to the United States Attorney.

This the 19th day of July, 1982.

s/ Woodrow W. Jones

Chief Judge

REPORT OF CONTACT
(Use ink or typewriter)

13

257-05-5572

TO: NE MAT SE GL WN MAH
BDI BIC DDS

George W. Shon

PERSONS CONTACTED AND ADDRESSES ☐ RECORD PERSON ☐ OTHER (Specify)

CONTACT MADE ☐ DO ☐ NO ☐ HOME ☐ PHONE ☐ OTHER

DATE OF CONTACT

SUBJECT: Good Cause - After Hearing -
The wife filed for disability in 1977 - At that time I also filed a request for return to (20/40 involved) No decision was ever made because of the 20/40 issue - He was denied on the basis that 20/40 not met SSA - removed SE (impaired return) - Good was filed - denied - Wife stated he wanted a hearing - However formal request was never filed and therefore hearing was never held. Wife has submitted evidence periodically during the last 5- yrs. but no notice re. hearing ever given.

SIGNATURES
DISTRICT OFFICE (Name, Address & Code)

☐ CR ☐ FR ☐ SN ☐ CLAIMS
☐ OTHER (Specify)

DATE OF REPORT

PAGE 1 of 2

REPORT OF CONTACT
(Use ink or typewriter)

14

ACCOUNT NUMBER AND DATE
257-05-53-78

TO: NE MAT SE GL WN MAM
BDI DIO DDS

NAME OF AGENT CARRIER OR SA PERSON
George W. Stone

PERSON'S CONTACTED AND ADDRESS: ☐ WE OR SE PERSON ☐ OTHER (Specify)

CONTACT MADE: ☐ CO ☐ BG ☐ CS ☐ HOME ☐ PHONE ☐ OTHER

DATE OF CONTACT

SUBJECT

I feel that it is the fault of this office, that Quierius was never held - We need to get two into to provide control as I tried to get him request for hearing. I sincerely believe good cause for State filing should be filed in this case.

Signature: [Signature]
168191
Franklin NC (452)

☐ IN ☐ FR ☐ SR ☐ CLAIMS ☐ CLERICAL
☐ OTHER (Specify)

DATE OF CONTACT
10/15/82
PAGE 2

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
BRYSON CITY DIVISION

CIVIL NO. B-C-81-242

MARY F. SHOPE, Executrix of the
Estate of George W. Shope,
deceased,

Plaintiff,

vs.

RICHARD SCHWEIKER, SECRETARY OF
HEALTH AND HUMAN SERVICES OF THE
UNITED STATES,

Defendant.

AFFIDAVIT

STATE OF NORTH CAROLINA
COUNTY OF SWAIN

I, JAMES H. HOLLOWAY, being first
duly sworn, state the following upon per-
sonal knowledge and oath:

1. I am co-counsel for Plaintiff in the
above entitled-action.
2. In the course of my investigation of
the matters and things at issue herein,
I had occasion, with prior approval of
the office of the United States Attor-

ney, to engage in a telephone conversation on March 12, 1982 with LEO BARONE an official of the Franklin District Office of the Social Security Administration, wherein she related to me the following:

That she personally knew the decedent GEORGE SHOPE and that she was familiar with his claim and claim file for Social Security Disability benefits.

That GEORGE SHOPE came into the Franklin Social Security Office on several occasions within the time period required for requesting a hearing, and that he did in fact ask for his hearing on those occasions.

THIS the 15th day of March, 1982.

/s/ JAMES H. HOLLOWAY
JAMES H. HOLLOWAY, Affiant

SUBSCRIBED TO AND SWORN TO BEFORE ME this 15th day of March, 1982.

/s/ PATRICIA H. NORFIELD
NOTARY PUBLIC

My commission expires:

1/16/83

(SEAL)

Social Security Notice of Reconsideration

23

From: Department of Health, Education, and Welfare
Social Security Administration

Date: 3/11/79

III-676:TD-1
251-05-5572 1A

Your Claim Number:

Mr. George W. Shope
Box 7
Otto, North Carolina 28763

251-05-5572

Dear Mr. Shope:

As you requested, your claim has been reconsidered. It has been found that the original decision was correct and in accordance with the law and regulations. The enclosed Reconsideration Determination fully explains the decision reached.

This reconsideration was made by a specially designated staff, different from the staff that made the original decision, and specially trained in the handling of reconsiderations. This staff made an independent and thorough examination of all the evidence on record about your claim.

If you believe that the Reconsideration Determination is not correct, you may request a hearing before an administrative law judge of the Bureau of Hearings and Appeals. If you want a hearing, you must request it not later than 60 days from the date you receive this notice. You should make such request through any social security office. Please read the enclosed leaflet for a full explanation of your right to appeal.

Carmell:aca:9/13/79

251-05-5572

Enclosures:

OA-D1227

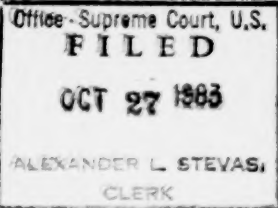
HEW Publication No. (SSA) 76-10282 DHA-1

Department of Health, Education, and Welfare
Social Security Administration

SSA-L84812-76

Appendix G

No. 83-108



In the Supreme Court of the United States

OCTOBER TERM, 1983

MARY F. SHOPE, EXECUTRIX OF THE ESTATE OF
GEORGE W. SHOPE, DECEASED, PETITIONER

v.

MARGARET M. HECKLER, SECRETARY OF
HEALTH AND HUMAN SERVICES

*ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE FOURTH CIRCUIT*

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

REX E. LEE
*Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217*

TABLE OF AUTHORITIES

Page

Cases:

<i>Boddie v. Connecticut</i> , 401 U.S. 371	3
<i>Califano v. Sanders</i> , 430 U.S. 99	3, 4
<i>Schweiker v. Hansen</i> , 450 U.S. 785	4
<i>Weinberger v. Salfi</i> , 422 U.S. 749	2

Statute and regulation:

42 U.S.C. (& Supp. V) 405(g)	2, 3
20 C.F.R. 404.933	2

Miscellaneous:

U.S. Dep't of Health, Education, and Welfare, Social Security Administration, DHEW Pub. No. (SSA) 77-10282 (BHA-1), <i>Right to Appeal Under Social Security and Medicare</i> (Feb. 1977)	3
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In the Supreme Court of the United States

OCTOBER TERM, 1983

No. 83-108

MARY F. SHOPE, EXECUTRIX OF THE ESTATE OF
GEORGE W. SHOPE, DECEASED, PETITIONER

v.

MARGARET M. HECKLER, SECRETARY OF
HEALTH AND HUMAN SERVICES

*ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE FOURTH CIRCUIT*

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

Petitioner brings this action on behalf of her deceased husband, who had claimed Social Security disability benefits. Petitioner contends that the dismissal of her husband's untimely request for an administrative hearing, which she alleges was filed late through the fault of the local Social Security office, constituted a denial of due process.

1. Petitioner's husband filed an application for disability insurance benefits on August 8, 1977. The application was denied initially on August 30, 1977, and again on reconsideration on March 10, 1978, on the ground that the claimant had not met the earnings requirement (Pet. App. 6a). The claimant then filed amended tax returns with the Internal Revenue Service that, if credited for Social Security purposes, would have given him the required coverage (Pet. 3). He requested reconsideration, but the Secretary of Health

and Human Services denied the request on October 6, 1978, on the ground that the claimant had failed to "substantiate the validity" of the newly reported self-employment income (*ibid.*).

The claimant told the local Social Security office that he wanted a hearing, but he did not file the written request required by regulation (see 20 C.F.R. 404.933) until two years later, on December 15, 1980 (Pet. App. 7a). An administrative law judge (ALJ) dismissed the request as untimely (*id.* at 8a). The ALJ also found that the claimant had failed to show good cause to extend the time for requesting a hearing, despite a statement by an employee in the local office that the claimant had made a timely oral request for a hearing and that it was the office's fault that a written request had not been submitted earlier (*ibid.*). The claimant died on May 3, 1981, and petitioner was substituted on his behalf. In August 1981, the Appeals Council affirmed the dismissal (*ibid.*).

In October 1981, petitioner brought this suit against the Secretary in the United States District Court for the Western District of North Carolina, seeking review of the refusal to grant him a hearing on his claim for benefits. The district court dismissed the suit for lack of jurisdiction (Pet. App. 5a-10a(v)). The court explained that petitioner was not seeking review of a "final decision[] * * * made after a hearing," as required by 42 U.S.C. (& Supp. V) 405(g) (Pet. App. 10a-10a(v)). The court of appeals affirmed in an unreported per curiam opinion (*id.* at 1a-2a(i)).

2. The gravamen of petitioner's action is that the Secretary abused her discretion by denying the claimant's untimely request for a hearing because there was in fact good cause for the untimeliness. See Pet. App. 10a(iv). The district court correctly held, however, that such a claim does not fall within the jurisdictional grant of 42 U.S.C. (& Supp. V) 405(g). See *Weinberger v. Salfi*, 422 U.S. 749 (1975). In

Califano v. Sanders, 430 U.S. 99, 107-108 (1977), this Court explicitly held that Section 405(g) "cannot be read to authorize judicial review of alleged abuses of agency discretion in refusing to reopen claims for social security benefits."

Sanders left open the possibility of judicial review of constitutional questions that do not strictly meet the language of Section 405(g), noting that such questions "obviously are unsuited to resolution in administrative hearing procedures and, therefore, access to the courts is essential to the decision of such questions." 430 U.S. at 109. Petitioner's efforts to bring her lawsuit within this rule, however, are unavailing. Due process does not confer an *unconditional* right to a hearing, only the opportunity for a hearing. The right may be forfeited by failing to comply with a procedural requirement to make a timely written request. See *Boddie v. Connecticut*, 401 U.S. 371, 378 (1971). It is undisputed that the Secretary does afford a right to a hearing if a timely written request is made. It also is undisputed that petitioner's husband did not file a written request for a hearing until *two years* after the denial of his claim for benefits, well beyond the authorized period, although he could have filed the request in a timely fashion.¹ The Secretary is not estopped from insisting on compliance with this valid regulation because petitioner's husband may

¹ Petitioner reprints (Pet. 4) the Reconsideration Determination notifying her husband of his right to request a hearing, thus implying that he had no notice that a written request was necessary. Petitioner does not reprint, however, the "enclosed leaflet" referred to in the Reconsideration Determination as containing a full explanation of the right to appeal. In fact, the leaflet enclosed with Reconsideration Determinations as a matter of practice in 1978, DHEW Publication No. (SSA) 77-10282 (BHA-1), explicitly states that the procedure for requesting a hearing is either "filling out a 'Request for Hearing' form" available at a local Social Security office or "writing a letter to your social security office." See U.S. Dep't of Health, Education, and Welfare, Social Security Administration, *Right to Appeal Under Social Security and Medicare* 3 (Feb. 1977).

have been given erroneous advice by a Social Security employee. *Schweiker v. Hansen*, 450 U.S. 785 (1981). While petitioner may have a legitimate claim that the procedural requirement should be waived for "good cause" in this case, this is not one of those "rare instances" (*Califano v. Sanders*, 430 U.S. at 109) where the claim is constitutionally based. Accordingly, Congress has committed the resolution of such a non-constitutional claim to the discretion of the agency, not the courts.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

REX E. LEE
Solicitor General

OCTOBER 1983